

Australia's Fair Work Act 2009 (Cth) (FW Act) entitles employees to a paid day off work on public holidays. However, there are circumstances where an employer, particularly one who does not operate in accordance with traditional business hours, can request that an employee works on a public holiday if such a request is "reasonable".

Two recent decisions of the Federal Court and Full Federal Court of Australia have laid some ground rules for employers who need employees to work on a public holiday. The decisions are particularly important for employers who have continuous operations, such as mining, healthcare facilities and hotels, and those who wish to conduct their business on public holidays, such as employers in the hospitality, leisure and retail industries.

The Entitlement to Be Absent on a Public Holiday

Most employees in Australia expect to have a paid day off work on public holidays. This arises under section 114(1) of the FW Act, which entitles employees to be absent from their employment on a day or part-day that is a public holiday. However, under section 114(2) of the FW Act, an employer can request that an employee works on a public holiday, but that request must be reasonable.

Section 114(3) of the FW Act entitles an employee to refuse the request to work on a public holiday if the request is not reasonable or the refusal is reasonable.

A Request to Work on a Public Holiday

The recent decision in *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51, provides clarity on what constitutes a request to work on a public holiday.

By way of background, the Construction, Forestry, Maritime, Mining and Energy Union (Union) alleged that OS MCAP Pty Ltd (OS) breached the FW Act when it required employees to work on Christmas Day and Boxing Day and contravened the relevant award by failing to pay the employees penalty rates for the work they performed on those public holidays. OS, a supplier of labour to a mine that operated on a continuous basis, denied the breaches and contended that the requirement to work the public holidays was reasonable. OS also denied that the award was contravened because the employees' annualised salaries compensated them sufficiently for the public holiday work.

The first instance decision is discussed below, as it remains relevant to the assessment of the "reasonableness" of an employee having to work on a public holiday. However, the case was brought on appeal by the Union, which contended that OS failed to make a request to the relevant employees to work the public holiday as required under section 114(2) of the FW Act, as it did not ask the relevant employees if they would be willing to work on Christmas Day and Boxing Day. Instead, it assumed that the employees who were rostered on those days would work, unless they applied for leave, which was subsequently approved.

The Full Bench of the Federal Court of Australia held that a request to work a public holiday must be understood according to its ordinary meaning. That is, an employer may, in the form of a question, request that an employee works on a public holiday, thereby leaving the employee with a choice. The Full Bench suggested that a discussion or negotiation as to the reasonableness of the request would follow the request, which may then result in the employee working the public holiday.

The Federal Court further confirmed that the requirement to make a request to an employee, as opposed to a "unilateral command", is intended to prompt a discussion, negotiation and/or refusal of the request, therefore confronting the "inherent power imbalance that exists between employers and employees". In summary, to comply with the FW Act, employers must first make a request to the relevant employee/s to work the public holiday and, second, the employee/s must have the capacity to refuse the request.

The Full Bench found that OS failed to make a request to the relevant employees, as there was an assumption that those employees rostered to work on those days would work, unless they applied for leave and it was granted.

Reasonableness

In determining whether a request, or a refusal of a request, is reasonable, the following considerations in section 114(4) must be considered:

1. The nature of the employer's workplace or enterprise, and the nature of the work performed by the employee
2. The employee's personal circumstances, including family responsibilities
3. Whether the employee could reasonably expect that the employer might request work on the public holiday
4. Whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, work on the public holiday
5. The type of employment of the employee (e.g. full time, part time, casual or shift work)
6. The amount of notice in advance of the public holiday given by the employer when making the request
7. In relation to the refusal of a request, the amount of notice in advance of the public holiday given by the employee when refusing the request
8. Any other relevant matter

In the recently appealed decision of *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd (No 2)* [2022] FCA 132, the Federal Court of Australia considered circumstances where it would be reasonable for employees to work on public holidays.

In this decision, the Federal Court found that OS demonstrated that the requirement to work the public holidays was reasonable because:

- There was an operational need for the employees to work the public holidays
- The employees were provided with notice before they accepted employment with the company that they would need to work on public holidays that fell within their set working days, and they were specifically informed and reminded that they were required to work on Christmas Day and Boxing Day
- The employees were paid an annualised salary, which adequately reflected the penalty rates under the award (in these circumstances, it would not be reasonable to expect the employer to make additional payments to volunteers or hire employees to work on public holidays)
- There was no reasonable alternative to requiring employees to work on Christmas Day and Boxing Day because of the company's contract with the requisite mine
- Employees who demonstrated special personal circumstances to take leave on public holidays were permitted to do so

An Indicative Process for Requesting Work on a Public Holiday

In light of the decisions outlined above, an indicative process for requesting that employees work on a public holiday is as follows:

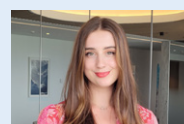
1. Where employees are likely to need to work on public holidays, this should be discussed with the employees upfront and the contract should contain a provision foreshadowing that the employees may be asked to work on public holidays and may be required to do so where the request is reasonable and a refusal unreasonable.
2. In respect of work on a particular public holiday, the employer must first request, in the form of a question, that the relevant employee work the public holiday. For employers who operate a roster system, this may involve:
 - a. Issuing a draft roster and ensuring that employees understand that the roster is in draft and forms a request to those employees who have been allocated to the holiday work that they indicate whether they accept or refuse that allocation; or
 - b. Requesting that employees work on the public holidays before the roster is finalised.
3. The employee must have the capacity to refuse the request if it is not reasonable having regard to the matters outlined in section 114(4) of the FW Act.
4. If an employee agrees to work on the public holiday, they may do so. If that employee does not have a salary that has been set with reference to public holiday work, the work performed on the public holiday may attract penalty rates.
5. If the employee refuses the request to work on the public holiday, the reason for their refusal must be assessed for reasonableness.

It is for the employer to justify why the request is reasonable. This may be by virtue of operational requirements, contractual requirements or the nature of its enterprise. If the request is reasonable, the employee must work unless they have a reasonable explanation for refusal.

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